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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1053

OKEECHOBEE COUNTY, FLORIDA,
Petitioner,

vs.

JOHN NUVEEN AND JOHN NUVEEN, JR., AS CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF JOHN NUVEEN & COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MANLEY P. CALDWELL,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petitioner above named respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered November 18, 1944, 145 F. (2) 684, (R. 136), petition for rehearing denied December 19, 1944 (R. 144).

(A) Summary Statement of Matters Involved

On August 8, 1941, John Nuveen and John Nuveen, Jr., (hereinafter referred to as Nuveens), entered into a contract with Okeechobee County, Florida (hereinafter re-

ferred to as County), to refund an issue of callable Road and Bridge Refunding Bonds, dated June 1, 1940, due June 1, 1970 (R. 8-15). The contract provided that the issue of Refunding Bonds would be transmuted into a new issue of non-callable bonds bearing lower rates of interest. Nuveens were to have the exclusive right to exchange the Road and Bridge Refunding Bonds dated June 1, 1940 for the new Refunding Bonds during the life of the contract. The County agreed to hold a public sale for the new Refunding Bonds which had not been exchanged, at which sale bidders would be required to bid for all or none of the bonds then ready for sale. Nuveens guaranteed to bid, at the time of the sale, a price of 103 and accrued interest for all of the bonds to be sold (R. 10). The contract provided (R. 11):

> "In the event that the successful bidder at said sale shall request the Board to accelerate delivery of the new Refunding Bonds to a date prior to the date of call, the Board will make delivery as requested, provided, however, that the successful bidder shall reimburse your Board for any interest to be paid on presently outstanding bonds between the date of delivery of the new Refunding Bonds and the date of call."

The 1940 Refunding Bonds were callable on any interest payment date on thirty days notice, at par, plus accrued interest. The interest was payable each June and December, therefore the call had to be made prior to November or May in each year.

The County agreed that it would not consider any bid of less than 103 (R. 11), and Nuveens were to receive a fee of three percent on the par value of the bonds sold.

The agreement was to continue in full force and effect from one year after its execution (one year from August 8, 1941), or until such later date as might be mutually satisfactory (R. 12).

The Nuveens put up a certified check for $10,000 to be forfeited as full and complete liquidated damages if they failed to fulfill the terms of the contract (R. 12). There were only two exceptions to this good faith guarantee deposit. One was that the Nuveens would be relieved of bidding on the bonds offered for sale if the United States was, at the time of the sale, involved, in war, and second, if the nationally recognized counsel (employed by Nuveens) failed to approve the new bonds.

Simultaneously with the execution of that agreement another agreement was entered into between the parties (R. 15-16), by which Nuveens agreed to indemnify the County against any litigation that might follow as a result of the execution of the first contract, and would defend all such suits without charge to the County. A $1,000.00 good faith check was likewise tendered in support of this agreement to be returned at the end of a year unless Nuveens should default in their undertaking, then in that event the check was to be cashed and the amount was to be accepted by the County as full liquidated damages for Nuveens failure to perform the obligations thereunder.

At the time of the execution of the contract, the County was then proceeding under the provisions of the Municipal Composition Act (11 U. S. C. 401-403) to compose its bonded indebtedness and force original issues of bonds (dated prior to June 1, 1940) into the very issue of Road and Bridge Refunding Bonds, dated June 1, 1940, which were the subject of the contract.

The Interlocutory Decree had been entered in March, 1941 confirming the composition proceedings, but was at the time of the execution of the contract on appeal, without supersedeas, to the United States Circuit Court of Appeals by certain objecting creditors. *Alfred I. duPont Testamentary Trust* v. *Okeechobee County*, 128 F. (2) 451. Both

parties knew of this fact; likewise, prior to the execution of the contract, the County had questioned Nuveens as to whether or not it should enter into the contract because of the bankruptcy proceedings (R. 91-93). Nuveens advised that the bankruptcy proceedings would hardly make the contract improper (R. 94).

The 1940 Road and Bridge Refunding Bonds, which were the subject of the contract, provided (R. 80) that if any of them were called prior to maturity they should be called by lot. There was a total of $1,125,542.54 of Road and Bridge Refunding Bonds authorized to replace a like amount of original indebtedness (dated prior to June 1, 1940), but there had been manually exchanged under the terms of the composition proceedings at the time of the contract only $824,720.47 of this total issue (about 75 percent). The remaining 25 percent of unexchanged original securities consisted in the most part of original bonds, dated prior to June 1, 1940, and which were being forced to take the 1940 Refunding Bonds by the composition proceedings.

After the execution of the contract, and in accordance with its terms, Nuveens caused a resolution to be prepared authorizing the issuance of the new Refunding Bonds (R. 59-71), which were to replace the 1940 callable bonds. This resolution did not provide bonds to replace the total of $1,125,542.54 of 1940 bonds outstanding, but only provided enough bonds to replace those that had been manually exchanged at that time. Thereafter, Nuveens prepared a proposed resolution to be adopted by the County calling the 1940 bonds for redemption on December 1, 1941 (R. 16). This call for redemption did not call the 1940 Refunding Bonds by lot, as required by the composition proceedings under the terms of the composition proceedings at the time of the contract, but was a blanket call for all bonds that had been manually exchanged, leaving all those that had

been authorized, but not manually exchanged, outstanding. The County adopted the resolution and gave notice of call (R. 16).

On November 22, 1941, the Fiscal Agent, under the composition proceedings, filed a petition in the bankruptcy court (R. 72-77) reciting to the Court that the composition had not been completed, was then on appeal, that the County had entered into a contract with Nuveens under which the call was not made by lot, and asked the Court to stay the proceedings or enter such other orders as might be appropriate. The attorney for Nuveens assisted the County in appearing in opposition to the order; however, the Court entered an order (R. 17) requiring the County to remain in status quo until the appeal was determined. Thereafter, in accordance with the order, the County revoked the call for redemption for December 1, 1941.

In February, 1942, after the entry of the order by the Court in the composition proceedings, the County attempted to cancel Nuveens' contract. Nuveens' representative appeared before the County (R. 88), and stated to the Board that Nuveens had an enforceable contract that the County could not legally rescind; that the contract had been developed to its present point at a great outlay of time and money, and was one which they (Nuveens) expected to enforce by every legal means at their command, and that the logical procedure was for the County to do exactly as the Judge had ordered and take no action of any kind until all litigation had been disposed of.

The appeal in the composition proceedings was dismissed in the early part of June, 1942 (*Alfred I. duPont Testamentary Trust, et al.* v. *Okeechobee County*, 128 F. (2) 451).

Immediately thereafter, the County applied to the United States District Court in the composition proceedings and asked the Court for an order allowing it to proceed with

the contract. Nuveens were notified by letter to this effect on June 15, 1942, and likewise notified that the validation of the new bonds would be concluded at an early date (R. 23). On June 30, 1942, Nuveens talked to the County Attorney (R. 96-97), suggesting that the best thing for them to do (the Nuveens) was to come down and "reshuffle the cards." Nuveens were informed that the validation would be completed on July 7, 1942, to which they replied that the matter should rest until they were heard from. Thereafter, on July 23, 1942, the County advised Nuveens that the decree validating the Refunding Bonds had been entered, and requested the bonds be prepared and printed, and forwarded to Okeechobee County for signature so they could be offered for sale. Nuveens requested a certified transcript of the validation proceedings (R. 25). To this request, the County replied that the complete transcript, with the exception of the final decree, had been mailed to Nuveens on November 7, 1941, but a new transcript would be forwarded to them, however there was no reason for delay because Chapman & Cutler, Nuveens' attorneys, had prepared the same.

On August 6, 1942, for the first time during the whole contract (R. 27), Nuveens advised the County that they had given careful consideration to the contract and that the contract had become impossible of performance before August 8, 1942, and requested the return of their check. The County declared a forfeiture of the money for failure of Nuveens to perform their contract.

Nuveens sued the County for the return of their money. The case was tried before the Judge and no testimony was offered by Nuveens, and very little by the County. Both sides requested and received admissions of fact. The District Court (R. 113-120) determined, as a matter of law, that the injunctive order relieved Nuveens from the payment of $10,000 as liquidated damages because the contract,

which the $10,000 guaranteed, had been enjoined. The Court further determined that after the injunction was lifted in June, 1942, there was not sufficient time between that date and August 8, 1942, the time of the expiration of the contract, within which the Nuveens could have performed because the callable bonds could not have been called for redemption in the interim between the time the injunctive order was lifted and the expiration of the contract.

The Circuit Court of Appeals affirmed, with one Judge (Judge Holmes) dissenting.

(B) Basis of the Jurisdiction of the Supreme Court

The Supreme Court of the United States has jurisdiction under Section 240 (a) of the Judicial Code, as amended. Title 28 U. S. C. A. 347 (a) to review the judgment.

(C) Reasons Relied Upon for Allowing the Certiorari

1. The District Court and the Circuit Court of Appeals, in applying the law of Florida as to impossibility of performance arising subsequent to the execution of the contract, there being no decisions in Florida precisely on point, should have followed the decisions of the Supreme Court of the United States, and in particular one coming up in Florida, that impossibility of performance of a contract arising subsequent to its execution did not relieve the Nuveens from a forfeiture of their good faith deposit. *Jacksonville Mayport, etc. R. R.* v. *Hooper*, 160 U. S. 514, 40 L. Ed. 515, 524 (Florida case); *Chicago, Milwaukee & St. Paul Railway Co.* v. *Hoyt, et al.*, 149 U. S. 1, 37 L. Ed. 625; *The Harriman*, 9 Wall. 161, 172, 173, 19 L. Ed. 629; *Jones* v. *United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Northern Pacific Railway Co.* v. *American Trading Co.*, 195 U. S. 439, 466, 467, 49 L. Ed. 269.

2. There being no Florida case on point, the District Court should have followed the common law rule which is in force and effect in Florida that impossibility of performance arising subsequent to the execution of a contract will not excuse one of the contractors from damages for failure to perform. *Parradine* v. *Jane*, Allyn 26.

3. The decision of the Circuit Court of Appeals that impossibility of performance arising subsequent to the execution of a contract would release one of the parties from paying contracted liquidated damages for failure to perform is in conflict with and contrary to decisions of other Circuit Courts of Appeal. *South Memphis Land Co.* v. *McLean Hardware Co.*, 179 Fed. 417 (C. C. A. 6) (1910); *English* v. *Hetherington & Berner, Inc.* (C. C. A. 7) (1934) 71 F. (2) 613, 616.

4. The District Court, in determining as a matter of law that the callable issue of bonds (dated June 1, 1940), had to be called simultaneously with the sale and delivery of the new Refunding Bonds is contrary to many Florida decisions precisely on point. (In addition it is contrary to the plain terms of the contract (R. 11)). *State* v. *City of Miami*, — Fla. —, 19 So. (2) 410; *City of Miami* v. *State*, 139 Fla. 598, 190 So. 774; *Fleeman* v. *City of Jacksonville*, 140 Fla. 478, 191 So. 840; *State* v. *City of Miami*, 142 Fla. 284, 194 So. 792.

Prayer for Writ of Certiorari

WHEREFORE, your Petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals commanding said Circuit Court of Appeals to send to this Court in due course all matters essential to the consideration of the questions presented by this petition, had in the case entitled on its docket "Okeechobee County v. John Nuveen, etc. et al.,

No. 11901," to the end that said cause may be reviewed and determined by this Court, as provided by the Statutes of the United States, and the judgment of the said Circuit Court of Appeals in said cause be reversed, and for such further relief as to this Court may seem proper.

Respectfully submitted,

MANLEY P. CALDWELL,
Attorney for Petitioner.